IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRI. APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 773 OF 1988

The State of Maharashtra ... Appellant

V/s

1. Mohan Hareshwar Ishad,
   At Kasarhat, Kalyan, Dist. Thane.

2. Anil Gopal Salvi alias Mandke,
   At Shahasadan Chawl No.2,
   Room No.5, Ganesh Peth,
   Dadar, Bombay.

3. Sabhandand Sitaram Patwardhan,
   At Daji Lele Wada, Parnaka,
   Kalyan, Dist. Thane.

4. Viju alias Nelson Vijay Abel,
   At Ghatkopar, Pantnagar,
   Bldg.No.139/3758, Bombay-75.

5. Raju alias Dnyaneshwar Tukaram Gaikwad,
   At Rajewadi, Bhimnagar,
   Tansa Pipe Line Zopadpatti,
   Ghatkopar, Bombay. ... Respondents

Mr. D.S. Mhaispurkar, A.P.P. for the appellant State.

Mr. G.H. Keluskar for the respondent No.3.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.

DATED: 18TH FEBRUARY, 2005

ORAL JUDGMENT (Per Kakade, J.):

1. The State has preferred this appeal against the

judgment and order passed by the II Addl. Sessions Judge, Thane, dated 14.3.1988 acquitting all the 5 accused persons of the charge for offences punishable under Sections 147, 148, 302 read with Sec. 149 of the I.P.C. and Sec. 135 of the Bombay Police Act.

2. Pending the appeal, respondent accused Nos. 1, 2 & 4 have died, therefore, appeal stands abated against them. In other words, the appeal is now lies only against accused Nos. 3 and 5.

3. The facts giving rise to the prosecution case, in brief, are thus -

Victim Dilip Kapote was the active worker and Shakha Pramukh of Kalyan Taluka Shivsena. The incident in question occurred on 5.10.1986 at about 9.00 p.m. at Kalyan on Bhiwandi Agra Road in front of the Bombay Battery Shop. Those were the days of Navratri festival at the Durgadi Fort situated on a billock at Kalyan. There was on that night Navratri festival celebration. Witness Harishchandra Hardas (PW-6) was the President of Navratri Utsav Committee. Opposite the Bombay Battery Shop on the other side of the road, there is Namskar Mandal. Deceased Dilip Kapote was residing near Namskar

Mandal. Accused No.1 Mohan was formerly a member of Shivsena. He was also employed as a driver on an ambulance car of Shivsena. About 4 years prior to the incident, accused No.1 Mohan left Shivsena and started his own garage. It was situated at Agra Road. Witness Subhash Apte (PW-5) was working in the garage of accused No.1. After leaving Shivsena, accused No.1 Mohan joined the Hindusena and became President of the Hindusena. Ravindra Kapote (PW-8) is the brother of victim Dilip Kapote. He is also a member of Shivsena. Witness Prakash Walanj (PW-2) is the owner of the Bombay Battery Shop. In front of his shop there is a shed. Adjacent to his shop in the building there is a garage.

On 5.10.1986 Prakash Puranik (PW-2) and his neighbour Manohar Joshi (PW-4) were proceeding to Durgadi Fort. It was at about 8.45 p.m. when they reached Namskar Mandal on Agra Road, Prakash Puranik heard call. He recognised it that of deceased Dilip Kapote. He saw Dilip sitting on a scooter that was opposite the Bombay Battery Shop. In pursuance of the call, he alongwith Manohar Joshi proceeded towards Dilip Kapote. On reaching there, he introduced Manohar Joshi to Dilip Kapote. At that time some 5 persons came running from the side of Namaskar Mandal. They were armed with

knives. They pushed Prakash Puranik to the side and surrounded Dilip Kapote. There was pushing and shoving and in that they came under the shed of the Bombay Battery Shop. These persons scuffled with Dilip Kapote and then they started assaulting him with knives repeatedly. On seeing that assault, Prakash Puranik immediately rushed to the house of Dilip to inform his father and brother. Immediately he came back alongwith father and brother of Dilip Kapote. They found Dilip Kapote lying in a pool of blood with multiple injuries on his person. He was unable to speak.

Prakash Puranik alongwith Manohar Joshi immediately rushed to Durgadi fort and informed witnesses Harishchandra Hardas (PW-6) and P.I. Naik (PW-14) who was attached to Bazarpeth Police Station, Kalyan and who happened to be there at Durgadi fort on account of bandobast duty in the vicinity. They were informed of the incident and the fact that Dilip Kapote was assaulted by five persons with daggers and knife and that he was lying in the pool of blood. On receiving the information, P.I. Naik alongwith Harishchandra Hardas rushed to the place where Dilip Kapote was assaulted. However, they found that Dilip was already removed from the place of assault to the hospital. In

the hospital, Dilip was examined and it was decided that he should be sent to the Civil Hospital, Thane. Accordingly, he was removed to the Civil Hospital at Thane, but was found dead.

4. Prakash Puranik when went to Bazar Peth Police Station, Kalyan, whose complaint was recorded by P.S.I. Suryagandh vide Exh.10. On that basis, C.R. No. 219/1987 was registered under Sec. 307 of I.P.C. and later on it was converted into under Sec. 302 of the I.P.C.

5. The investigation commenced, in which course, the inquest panchnama was made and body was sent to post-mortem examination which was performed on the next morning. The post-mortem report is at Exh.33 on record. Panchnama of the scene was prepared and the articles were seized in the course of the said panchnama. The post-mortem report revealed that there were as many as 30 incised wounds on the body of the Dilip Kapote as a result of which he died. In the course of the investigation, accused No.1 was arrested on 13.11.1986, accused Nos. 2 and 3 were arrested on 15.11.1986, and accused Nos. 4 and 5 were arrested on 18.11.1986 under arrest panchanams. Accused No.1 was interrogated by the

police in which course weapons of offence were recovered vide Articles 25 to 28 at his instance from the place where those were hidden. Similarly, accused No.3 produced the clothes which were seized under panchnama. On 18.11.1986 and 23.11.1986, the Sub-Divl. Magistrate (PW-13) held identification parade for accused Nos. 2 to 5 at Kalyan wherein witness Prakash Puranik (PW-1) identified accused Nos. 2 to 5, whereas the witness Manohar Joshi (PW-4) identified accused Nos. 2 and 3 only on 23.11.1986. The seized articles in the course of the investigation were sent to the C.A. for examination whose report is received and is part of the record. On completion of the investigation, the chargesheet was sent to the Court of law. The Magistrate committed the case to the Court of Sessions. The learned Sessions Judge framed charge against the accused persons for the impugned offences, to which they pleaded not guilty. The defence of the accused is that of total denial of any criminal liability for which they were sought to be saddled. The defence is that none of the accused persons were involved in the assault and assault was committed by some other persons.

The learned Trial Judge proceeded to record the evidence of the prosecution and came to the conclusion that the

prosecution had failed to establish that the assailants of the victim at the relevant time and place were none else than the accused persons and, therefore, the result of such failure on the part of the prosecution to establish the identity of the accused persons, all of them came to be acquitted of all the charges framed against them. Hence the appeal.

6. We have heard the learned A.P.P. for the appellant State as well as the learned counsel for the respondent accused persons. With their help we have also perused the entire prosecution evidence on record.

7. At the outset, it may be noted that, it is the case founded upon the eye-witness account as there are as many as 3 eye-witnesses brought forward by the prosecution besides other substantial evidence on record. However, on careful scrutiny of the eye-witness account, it is found that none of the eye-witnesses have positively identified any of the assailants at the relevant time and place. Moreover, the identification parade held in the course of the investigation has also become suspect and, therefore, the evidence regarding identity of the assailants is found to be doubtful of which benefit has been given to the appellants. In view

of this position, the circumstantial evidence being already weak in nature, could not sustain and prosecution failed to bring home the guilt.

8. It may be noted that it is not in dispute that Dilip Kapote, at the relevant time and place suffered homicidal death. It is also clear from the medical evidence on record that he suffered as many as 30 incised wounds which were inflicted with hard and sharp object like knife and dagger. The injuries were not sufficient in the ordinary course of nature to cause death as per the statement made by the medical officer. The main question around which the entire case revolves is regarding the identity of the crime. In other words, it is required to be seen whether the prosecution evidence is sufficient to bring home the guilt against the accused persona as sought to be proved by the prosecution.

9. PW-1 Prakash Puranik and PW-4 Manohar Joshi and PW-2 Walanj are claimed to be the eye witnesses. Out of them, witness PW-2 Walanj, as his evidence shows, appears to be the eye-witness of attack but does not know that the accused were the assailants of Dilip Kapote. So far as PW-1 Puranik and PW-4 Joshi are

concerned, their evidence requires independent appreciation. PW-4 Joshi stated in his evidence that, in that night he was with Prakash Puranik and both of them were going to Durgadi fort. While they were passing by Namskar Mandal, Puranik received call from some person sitting on a scooter in front of Bombay Battery shop. He proceeded towards that man and he (Manohar Joshi) followed him. While Puranik was introducing him, 4-5 persons came their from back side armed with knife and daggers and assaulted the person who was on the scooter inflicting several blows causing multiple injuries to him. He fell down from the scooter. The person who was assaulted was deceased Dilip Kapote. His next version is consistent with that of Puranik as to what was done afterwards. He identified accused Nos. 2 and 3 in identification parade held on 23.11.1986. PW-2 Walanj claims that, on that night at about 9.00 p.m. he was working in his shop. He saw Dilip Kapote having come there and sat on his scooter that was parked adjacent to the shed of his shop. Then he heard Dilip having called Puranik and saw Puranik having gone to Dilip Kapote and then both talking with each other, at which time he went to the garage, he heard a cry and found that Dilip Kapote was shouting. He saw that Kapote was fallen down from the

scooter inside the shed and further was being assaulted by 4-5 persons. Seeing that assault, he got frightened and so shut the door of the garage. When there was commotion outside, he opened the door and came out of the garage. He found Dilip Kapote was lying in a pool of blood. Perusal of the testimonies of eye-witnesses, therefore, shows that presence of witnesses Puranik as well as Joshi appears to be quite natural as stated by them. There was nothing impossible or improper that both of them were going by the road at which time Dilip Kapote was near the shop and Puranik was called by him and hence they approached Dilip Kapote. There was attempt by 4-5 persons armed with knives and daggers. However, PW-1 Puranik has stated that, after seeing the assaults on Dilip Kapote, he immediately went to his house to inform his father and brother. The question which arose from their testimonies is regarding the identity of the accused as the assailants. Before we consider the claim as to identification, it is necessary to bear in mind the circumstances which were attaining the case. The incident had taken place at night time. The panchnama of the scene of offence which clarifies the situation that, in front of the Bombay Battery Shop there was a shed, then there is a garage to the Bombay Battery Shop. The scooter on which Dilip was sitting

was in front of the garage and just near the shed. There was pool of blood found in the shed. This indicates that the assailants assaulted the victim Dilip Kapote on that spot. The attack on Dilip was sudden by 4-5 persons. The assailants came from the back side. Witness Puranik was talking with Dilip Kapote who was sitting on the scooter facing towards south. So, it is clear that the witness Puranik was also facing towards the north. The assailants came running and as soon as they reached, they started attacking Dilip Kapote. Both the witnesses Puranik and Joshi became stunned seeing the sudden attack as they have said admitting candidly that they got frightened and what was in their mind is to save themselves. Witness Joshi further admitted that he witnessed the incident. Joshi further admitted that he had no occasion to know the accused and that he had not seen them prior to the incident. He was not knowing any of them. The very fact that he was being introduced to Dilip shows that even he was not knowing Dilip. Witness Puranik claimed before the Court that he knew the accused and he identified them. Lastly, it is material to note that neither of them had stated in the evidence that they saw the assailants in the light of electric tube light and electric bulb. It is not their say that tube light and electric bulb were burning at

that time and in the light of that they saw the assailants. It is also to be further noted that Puranik on noticing the assault, immediately rushed to the house of Dilip to inform his father and brother. After he returned accompanying them, he noticed that Dilip was lying in a pool of blood. All this aspect show that witness Puranik had no opportunity to see the assailants when they went away. So far as Joshi is concerned, he claimed that he got frightened on seeing the assault and so he immediately turned back and ran towards Namaskar Mandal and kept standing near a tree. The evidence of Prakash Puranik clearly shows that assailants came from his back side and started assaulting Dilip Kapote. When the assault was going on, other witnesses immediately rushed to the house of Dilip Kapote to inform his father and brother. Moreover, his claim that he was knowing assailants and recognised them also appears to be doubtful. If that was so, the question is, what prevented him from disclosing the names of the assailants to witness PW-6 Hardas and P.I. Naik who came on the scene immediately after they were informed about the same. What was disclosed by him that Dilip Kapote was assaulted by 5 persons and he was lying in the pool of blood. What is more surprising is that, even in his complaint which he lodged in the police

station he did not give the particulars and description of the assailants. He would have given their names as well as the names of other eye-witnesses, if he had identified them. Hence his evidence is riddled with doubts and, therefore, appears to be unsafe to accept it.

10. Once we reach this position, let’s now turn to the evidence of indentification parade dated 23.11.1986. Witness PW-13 Kulkarni was the Special Judicial Magistrate who conducted the indentification parade and stated that witness Prakash Puranik identified accused Nos. 2 to 5 and witness Manohar Joshi identified accused Nos. 2 and 3. However, if we critically peruse the entire evidence regarding the identification parade, a serious doubt appears to be apparent from the record in that regard. In the first place, the identification parade was held in police control room. Admittedly, accused were brought much earlier and they were kept openly in the same premises where police station is situated. What is more significant is that the witnesses who were to identify were made to sit in the open space outside the police control room. Then identification parade was held 8 days after the arrest of accused Nos. 2 & 3 and four days after the arrest of

accused Nos. 4 and 5. The investigating officer P.I. Takne candidly had admitted that accused No.1 was not sent for identification parade though it was possible. However, there is no explanation for such omission. The delay in holding the identification parade much after the arrest of the accused and much after the occurrence of the incident again leads to strong suspicion in the mind. If we take into account, the possisble circumstances surrounding the place and holding of identification parade, there is no doubt whatsoever that evidence of identification parade cannot be accepted as substantive piece of evidence nor it can be held to be corroborative to testimonies of eye-witnesses.

11. The testimony of PW-13 Kulkarni, Special Judicial Magistrate also is sufficient to show that he has admitted that he did not ask any of the witnesses whether he had an opportunity to see the accused persons before identification parade. He did not ask any of the accused whether they were seen by the witnesses earlier in the period between the date of the incident and the date of identification parade. No enquiry was made by him in that regard and proceeded on presumption that everything was according to rules. Be that as it may, the fact remains that evidence of identification parade

cannot be accepted.

12. Once we reach this position, the so-called evidence of recovery of weapons as well as other circumstantial evidence on record, such as, C.A. certificate, fed into insignificance especially when in view of the fact that the evidence of eye-witnesses or identification parade are found to be untrustworthy and insufficient to inspire confidence. Therefore, we are of the considered view that the prosecution has failed to establish guilt of the accused persons beyond reasonable doubt and, therefore, they were entitled to the benefit of doubt.

13. Taking into consideration all the entire evidence on record, therefore, we hold that the learned Trial Judge has rightly discarded the prosecution evidence and has properly come to the conclusion that the prosecution evidence failed to bring home the guilt for want of sufficient evidence on record.

14. In the result, we do not see any merits in the appeal and, therefore, appeal stands dismissed. The bail bonds of the accused persons stand cancelled.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)